

## **Student Ability and Educational Justice**

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### **Abstract**

The concept of ‘ability’ is a crucial building block for any theory of justice in education. The fact that students have different abilities is one of the main issues that theories of justice must address, determining when the persistence of differential abilities among students is just and when it is not; and whether differential treatment of students with different abilities should be permitted, mandated, or does it constitute wrongful discrimination. In addition to affecting the content of general principles of justice in education, resolving the issue of unequal ability is also a key to discussions concerning the moral permissibility of specific educational policies such as ability grouping, programs for the gifted, and special education.

Despite the fact that ability is such a central issue for theories of justice in education, the subject has received surprisingly little attention in the literature. This paper aims to critically examine the different meanings of ability that are present in the philosophical debate. Through this examination, the paper exposes some serious challenges pertaining to traditional concepts of educational justice and contributes toward a more comprehensive theory of ability in educational justice.

### **1. INTRODUCTION**

The practice of differentiating between students according to their ability is so embedded in our educational practices that it seems completely inescapable. Schools’ role in imparting knowledge and skills makes it seem reasonable that ability is the relevant basis for differential treatment such as offering extra help or assigning more advanced tasks. As a result, theories of distributive justice often explicitly require treating children with different abilities differently in order to promote justice. For example, theories of educational adequacy require investing more resources

in children with lower ability in order to ensure that they reach the adequacy threshold.<sup>1</sup> Similarly, egalitarian approaches require giving special attention to disadvantaged children in order to equalize their academic attainment.<sup>2</sup>

The treatment of children with different abilities, however, also takes on forms that are more contested, and that have been subject to ethical and legal debate, such as ability grouping (also known as tracking), special education, and programs for gifted children. While the universality of treating children according to their abilities cannot be disputed, it is unclear whether, and in what circumstances, these practices are morally permissible, required, or prohibited.

Given that ability is so crucial for any discussion of distributive justice in education, it is surprising how little explicit attention it is given in the relevant philosophical literature.<sup>3</sup> This literature deals with ability in one of two main ways: The first focuses on specific educational practices and policies. Debates over programs for the gifted, for example, are inextricably connected to the concept of ability, adopting certain definitions of it and arguing for the moral consequences that follow. The second context in which ability is discussed is the debate concerning theories of justice in education, and especially around the question whether differential educational outcome that results from differential ability is fair.

Both kinds of work, however, fail to offer a coherent theory of ability: they rarely refer to more than one isolated issue and do not examine the relations between the role of ability in theories of educational justice and its role in justifying specific educational practices. Furthermore, the discussion rarely applies to the full range of ability, including the cognitively disabled and the gifted.<sup>4</sup> Moreover, the literature does not perform a direct and critical discussion of the meaning of ability, which results in some significant problems. For example, meritocracy, probably the

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<sup>1</sup> “Adequacy” theories are sufficientarian theories of educational justice. See: Elizabeth Anderson, *Fair Opportunity in Education: A Democratic Equality Perspective*, 117 ETHICS 595 (2007); AMY GUTMANN, *DEMOCRATIC EDUCATION* (1987); Debra Satz, *Equality, Adequacy and Education for Citizenship*, 117 ETHICS 623 (2007).

<sup>2</sup> Harry Brighouse, *Educational Equality and School Reform*, in *EDUCATIONAL EQUALITY*, (Graham Haydon, ed., 2011); Christopher Jencks, *Whom Must We Treat Equally for Educational Opportunity to be Equal* 98 ETHICS 518 (1988); ADAM SWIFT, *HOW NOT TO BE A HYPOCRITE: SCHOOL CHOICE FOR THE MORALLY PERPLEXED PARENT* (2003); Reference omitted for review.

<sup>3</sup> Ability is, however, a central concept in discussions in philosophy of action and has also implications for debates surrounding free will. For a general description of these see: ‘Abilities’, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (23.7.2014).

<sup>4</sup> Children with cognitive disabilities are often treated as an exception, or a test case to ascertain whether the theory of justice is reasonable. On the other hand there is a separate body of theoretical work that focuses exclusively on disability, a lot of which is based on the social model of disability, yet this literature too does not offer a comprehensive analysis of other kinds of practices that involve ability, nor does it account for the role of ability in general principles of educational justice.

most influential theory of educational justice, both in theory and in education policy, bases its moral dictates on a conception of ability that has been rejected for decades by experts on human cognition. Additionally, the lack of principled discussion prevents addressing some objections that apply to theories of justice, such as the persistence of differential ability, and the limitations of individual students' cognitive abilities.

I also find that the discussion of ability is fraught with excessive caution. Issues such as whether disabled individuals have a fixed deficit in ability (and whether disability even is a deficiency), or Herrnstein and Murray's controversial "The Bell Curve" (1994) (arguing that differences in IQ exist between individuals from different races),<sup>5</sup> are tiptoed around or avoided altogether out of fear of being politically incorrect. This prevents rigorous analytical exploration and, more importantly, fails to supply moral underpinning for demands for education reform.

This paper aims to begin a more comprehensive discussion of ability in education. It examines the meaning of ability and how it affects the requirements of justice in education. It aims to link the treatment of ability in the discussions about what justice in education requires of us in general, to the ethical debates concerning specific educational practices, such as ability grouping, special education and gifted programs. Doing so has numerous theoretical and practical upshots that are pointed out throughout the paper. A number of arguments made in the paper stand out, however, in terms of their contribution to the general discussions of distributive justice in education.

The first involves the meaning of ability that is used in the debate between meritocracy and luck egalitarian approaches to educational justice. Meritocrats and Luck egalitarians disagree as to whether differences between individuals with regard to their abilities justify inequality in educational outcome (Meritocrats argue that such inequality is just, and luck egalitarians argue that it is not). I argue that the meaning of ability used by both sides in this debate, namely as a congenital and fixed trait, is unsustainable. Replacing it with a more plausible understanding of ability, namely ability as potential, leads to a new account of meritocratic justice in education. This new, more demanding account, allows for inequality in educational outcome only when it results from unavoidable limitations of potential.

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<sup>5</sup> RICHARD J. HERRNSTEIN AND CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994).

Another argument concerns the question whether ability is a discriminatory category in its own right (or is it only problematic because it correlates with race and class thus causing indirect discrimination). I argue that although ability shares some of the characteristics that other “suspect” classifications (such as race or sex) have, it is also substantially different from them. While we do not think that being white is better, in any objective sense than being black, or being a man better than being a woman, we usually do think that having high ability is better than having low ability. If we endorse this perfectionist view and attribute independent value to high ability (and I argue that our educational practices and our behavior as parents to young children indicate that we do), the dignitary harm suffered from being classified as low ability may be especially severe. Despite this, prohibiting all types of differential treatment for children with unequal abilities would prevent granting them any extra help or resources. So, a tension exists between holding that developing high ability is valuable, a determination that entails investing resources in promoting the abilities of children with lower abilities, and the fact that ascribing value to high ability makes labeling of individuals as having lower ability degrading. The choice of pedagogy and policy should reflect this tension. Policies such as tracking, that conveys a message that a student’s low ability is fixed and unchangeable should be avoided, whereas differential treatment that is less conspicuous should be preferred.<sup>6</sup>

A third main argument made in the paper concerns the desire to realize the potential of children with high abilities. The value of developing high ability is a central question in educational justice, lurking in the background of debates regarding programs for the gifted, redistribution of resources from children with high abilities to those with low abilities, and the egalitarian requirement to level down. Theories of justice accommodate the intuition according to which developing high ability is desirable in different ways, which I describe in the paper. I argue that the perfectionist value of developing high academic ability is an independent, external value. Instead of being incorporated into the theories of justice themselves, it should be considered after establishing the requirements of justice, and balanced against them.

The paper begins (Part 2) by presenting three educational practices that involve separating children according to their abilities and the main objections they raise. The discussion of these three practices – ability grouping, gifted education, and special education – aims to

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<sup>6</sup> Although this consideration could be outweighed by others. For example, if ability grouping is extremely beneficial in terms of the educational attainment of the disadvantaged, this may outweigh the negative effect of labeling.

“problematize” the concept of ability – to suggest why it might be a discriminatory classification, and to motivate the discussion of the concept of ability. I do not define ability at this stage; instead, I use a very general meaning of ability that involves academic abilities in the widest sense. I then move on, in part 3, to distinguish three different meanings of “ability” used in the literature concerning distributive justice in education, and the role they play in the discussion of educational justice. The first meaning of ability consists in cognitive skills and knowledge an individual has at a specific moment (Part 3.a); the second involves natural endowments (Part 3.b); and the third is potential, or an expected, conditional ability (Part 3.c). This discussion exposes the challenges that each meaning raises and the problems that arise from their respective uses in moral arguments. The final part of the paper (4) brings together some of the observations and arguments in the paper towards a comprehensive theory of ability in education.

## 2. THREE EDUCATIONAL PRACTICES

Ability grouping, educational programs for the gifted, and special education all involve separating children according to their academic abilities and providing them with separate education. The typical justification for all three practices is that decreasing heterogeneity in classes enables teachers to adapt their teaching to the level of their students and is therefore conducive to effective teaching. According to this rationale, ability grouping is supposed to benefit all students, high abilities as well as low, all of whose needs can better be attended to in a homogeneous group.<sup>7</sup>

All three practices have been challenged, however, as creating injustice in education for similar reasons. And though the arguments differ slightly in each case, the basic arguments are similar. I will discuss mainly three arguments against practices that separate students according to their abilities – that it creates indirect discrimination against excluded minorities, that it harms the worst off, and that ability is a discriminatory categorization in its own right.<sup>8</sup>

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<sup>7</sup> JUDITH IRESON AND SUSAN HALLAM, *ABILITY GROUPING IN EDUCATION* (2001); Garry Hornby, David Mitchell and Chrystal Witte, *Policies and Practices of Ability Grouping in New Zealand Intermediate Schools*, 26 SUPPORT FOR LEARNING 92 (2011); NATIONAL EDUCATION ASSOCIATION, *ACADEMIC TRACKING, REPORT OF THE NEA EXECUTIVE COMMITTEE SUBCOMMITTEE ON ACADEMIC TRACKING* (1990).

<sup>8</sup> These are not the only possible arguments against separating students according to their ability. It has been argued also that the existing methods for measuring ability are inadequate. They are overly narrow; they favor a certain kind of talents and crowd out all other kinds of talents; they are culturally biased, and therefore advantage children who are socially privileged. Steven Mazie, *Equality, Race and Gifted Education: An Egalitarian Critique of Admission to NYC's Specialized High Schools*, 7 THEORY AND RESEARCH IN EDUCATION 5 (2009); Susan Hart, *A Sorry Tail: Ability*,

### *2.a Classifying by ability causes indirect discrimination*

The first argument against separating children according to their ability is that it results in segregation according to race, ethnicity and class, categories that are viewed as discriminatory. So while ability may not be discriminatory in itself it causes indirect discrimination. Children from poor families, racial minorities and other excluded communities, are overrepresented in lower tracks and in special education, whereas children from privileged families are overrepresented in higher tracks and in gifted programs.<sup>9</sup> Educational attainment correlates social categories such as class and race.<sup>10</sup> This results from a combination of reasons that are related to poverty, nutrition and lack of cognitive stimulation,<sup>11</sup> but also from implicit biases that pervade educational practices. Numerous classroom studies show that teachers are more likely to under-evaluate the academic abilities of minority children, are more likely to react negatively to misbehavior on their part, and are less likely to engage in positive interaction with them.<sup>12</sup> So

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*Pedagogy and Educational Reform*, 46 BRITISH JOURNAL OF EDUCATIONAL STUDIES 153 (1998); Michael Merry, *Educational Justice and the Gifted*, 6 *Theory AND RESEARCH IN EDUCATION* 47 (2008). Another argument, best identified with Elizabeth Anderson is that segregation causes social alienation that leads to relations of subordination that hinders the ability to foster the appropriate social relations required for democratic equality. ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* (2010); Charles Bailey and David Bridges similarly argue that ability grouping supports social divisiveness, encourages competitiveness, and devalues supportive cooperation. See CHARLES BAILEY AND DAVID BRIDGES *MIXED ABILITY GROUPING: A PHILOSOPHICAL PERSPECTIVE*, pp. 38-45 (1983).

<sup>9</sup> Jeannie Oakes, *Two Cities' Tracking and Within-School Segregation*, 96 TCHR. C. REC. 681 (1995); Anthony D. Greene, *Tracking Work: Race-Ethnic Variation in Vocational Course Placement and Consequences for Academic and Career Outcomes*, 1 INT'L J. EDUC. STUD. 9 (2014); Mary Cipriano-Walter, *Falling off the Track: How Ability Tracking Leads to Intra-School Segregation*, 41 T. MARSHALL L. REV. 25 (2015); Roslyn Arlin Mickelson & Bobbie J. Everett, *Neotracking in North Carolina: How High School Courses of Study Reproduce Race and Class-Based Stratification*, 110(3) Tchr. C. Rec. 535 (2008); Daniel G. Solorzano & Armida Ornelas, *A Critical Race Analysis of Advanced Placement Classes: A Case of Educational Inequality*, 1(4) J. LATINOS & EDUC. 215 (2002). Donna Y. Ford, *The Underrepresentation of Minority Students in Gifted Education: Problems and Promises in Recruitment and Retention*, 32(4) J. SPECIAL EDUC. 4 (1998); Jesse O. Erwin & Frank C. Worrell, *Assessment Practices and the Underrepresentation of Minority Students in Gifted and Talented Education*, 30(1) J. PSYCHOEDUCATIONAL ASSESSMENT 74 (2012).

<sup>10</sup> RICHARD D. KAHLENBERG, *ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE* 25-35 (2001).

<sup>11</sup> ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS RACE AND FAMILY LIFE* (2003); TERRIS ROSS & GRACE KENA, *HIGHER EDUCATION: GAPS IN ACCESS AND PERSISTENCE STUDY* (2012, US Department of Education and National Center for Education Statistics); JOHN ERMISCH, MARKUS JANTTI & TIMOTHY M. SMEEDING, *FROM PARENTS TO CHILDREN: THE INTERGENERATIONAL TRANSMISSION OF ADVANTAGE* (2012).

<sup>12</sup> Russell J. Skiba, Robert S. Michael, Abra Carroll Nardo, and Reece L. Peterson, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URBAN REVIEW 317 (2002); Steve Knotek, *Bias in Problem Solving and the Social Process of Student Study Teams: A Qualitative Investigation*, 37 J. OF SPEC. ED. 2 (2003); Robert A. Garda, *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071 (2005).

when teachers and schools separate children according to their ability, they will in most likelihood also separate them according to social class and ethnicity.

Despite evidence of blatant racial and class segregation, courts in Israel and the US are unwilling to accept the argument that ability grouping constitutes indirect discrimination. Courts regard the decision whether to enact tracking or not as a matter of educational expertise well within the discretion of education administrators.<sup>13</sup> In the US only when ability grouping was performed immediately after desegregation the court struck it down stating that it reflected the past injustice caused by segregation rather than the students' actual abilities. The case, *Hobson v. Hansen*<sup>14</sup> involved tracking students in the District of Columbia to one of several tracks that ranged from "basic" for the slow students to "honors" for gifted students. The children were assigned to the different tracks based on intelligence and prior achievements, and the separate tracks learnt different curricula. This method of student assignment resulted in almost complete segregation in schools, with the higher tracks serving an overwhelming majority of white students, and black students assigned to mostly lower tracks. In subsequent cases, however, in which the students themselves were not subject to de-jure racial segregation, the court rejected the claim that the ability reflected social injustice rather than actual ability.<sup>15</sup>

The European Court of Human Rights (ECtHR) has taken a different approach. In several cases that involved children from the Roma community, the court stated that practices that aimed to separate children and resulted in severe overrepresentation of children from the Roma community in lower tracks and special education were discriminatory.<sup>16</sup>

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<sup>13</sup> In Administrative Petition (Jerusalem) 8123/08 Frenkel v. Hartman (2008) the administrative court dismissed a petition against policy in Jerusalem assigning students to middle school using IQ tests. Although general research-based evidence was presented showing correlation between success in IQ exams and group affiliation, the court required evidence showing that the specific assignment policy based on IQ exams, disadvantages children belonging to one of the protected groups. The argument was also put forward unsuccessfully in Administrative petition (Tel Aviv) 6691-04-12 All About Education v. Ministry of Education. (The court dismissed a petition challenging the policy of assigning students to ninth grade to high schools according to their academic attainments. The policy was ultimately relinquished by Ramat Gan township while the appeal was pending).

<sup>14</sup> 269 F. Supp. 401 (D.D.C. 1967).

<sup>15</sup> *McNeal v. Tate County School District* 508 F.2d 1017 (1975); *NAACP v. Georgia* 775 F.2d 1403 (11th Cir. 1985); *Montgomery v. Starkville* 854 F.2d 127 (1988).

<sup>16</sup> *D.H. & Others v. Czech Republic*, No. 57325/00, 13 November 2007; *Affaire Sampanis et Autres c. Grèce*, No. 3526/05, Arrêt du 5 juin 2008 (CEDH 1e Section); *Orsus v. Croatia*, Application no. 15766/03, 16 March 2010 (ECtHR, Grand Chamber); *Horvath & Kiss v. Hungary*, Application No. 11146/11, 29 January 2013. For a discussion of these decisions and an argument for the existence of a "duty to integrate", see: Julie Suk, *Antidiscrimination Law and The Duty to Integrate* (paper presented at an international conference on "The Moral Status of Discrimination" held on December 2016 in Jerusalem. On file with author).

*2.b Separating children by their ability disadvantages the worst-off*

The second argument against separating students according to their abilities is that it is bad for students with low abilities, and in other words it harms the worst off. This argument is especially relevant in the case of tracking and special education, two practices that were initially designed to benefit all children, primarily those with lower abilities, assuming that teaching is more effective in homogeneous groups. Research, however, shows that the opposite is true, and that children with lower abilities and children with disabilities are disadvantaged by such segregation. Tracking, and especially early tracking, has been proven detrimental to the educational opportunities of students from disadvantaged groups. It does not boost the educational achievements of those with lower abilities, it diminishes them, thus reinforcing the effects of family background on educational outcomes.<sup>17</sup>

Some argue that separation in itself is not to blame for inequality, as long as educational services are of equal quality.<sup>18</sup> However students in lower tracks typically do not receive equal resources, equally good teachers, and suffer from negative peer effects.<sup>19</sup> It is also likely that even if ability grouping can be conducive to learning, being labeled as possessing low ability negatively affects teacher expectations and self-expectations, which work as self-fulfilling prophecies.

The truth of these claims, like any consequentialist claim, depends on facts. Segregated special education and ability grouping clearly disadvantages the worst off sometimes. However, there may be other cases in which it may be beneficial. Many cases are likely to be a complicated mix of benefits and disadvantages that must be weighed against each another.<sup>20</sup> Asserting that separate education is never desirable is no way near sufficiently empirically substantiated. In fact, I seriously doubt it is true. Think, for example, of a cognitively disabled teenager who prefers learning with peers with a similar disability in order to avoid the social challenges and

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<sup>17</sup> Annabelle Krause & Simone Schuller, *Evidence and Persistence of Educational Inequality in an Early-Tracking System: The German Case* (Discussion Paper IZA 2014); Volker Meier & Gabriela Schutz, *The Economics of Tracking and Non-Tracking*, IFO working paper (2007).

<sup>18</sup> David N. Figlio & Marianne E. Page, *School Choice and the Distributional Effects of Ability Tracking: Does Separation Increase Inequality?*, 51 JOURNAL OF URBAN ECONOMICS 497 (2002); John White, *The Dishwasher's Child: Education at the End of Egalitarianism*, 28 JOURNAL OF PHILOSOPHY OF EDUCATION 173 (1994).

<sup>19</sup> Meier & Schutz, *supra* note 17.

<sup>20</sup> Of course, there may be complications here too: There may be disadvantage in terms of educational progress for learning in an inclusive class, but this may be outweighed by the advantage in terms of social inclusion and self esteem. For the objection to hold, however, one is required to show that after factoring all of these, inclusive education is altogether worse in terms of outcome than the other options.

related stress that is inherent in inclusive education. Or a separated program preparing children with low ability for high track programs in Science and Math, that has high success rates in integrating children into high tracks. Therefore this argument cannot base an absolute rejection of separating children according to their ability.<sup>21</sup>

Also note that while this argument aims to abrogate separation of students according to their ability, it does not aim to abolish differential treatment altogether. Quite the opposite – if inclusion is to succeed, differential treatment of children according to their abilities is crucial.

And even if we can prove that a practice has negative consequences for the disadvantaged, and that this outweighs any possible benefits for them, one still has to show when challenging separation, that this outcome is impermissible in terms of justice. Surprisingly perhaps, not all theories of justice in education require that we give primary weight to the worst-off. To give an example, meritocracy, and adequacy, two very central principles of educational justice, are not always concerned with the situation of the worst off. Adequacy merely requires that all children achieve an adequate level of education, and meritocracy requires that educational achievement correlate ability and effort. Both theories therefore, would not necessarily conclude that such separation is not allowed, even if negative influence on children with low abilities is demonstrated.

### *2.c Ability is a discriminatory classification in itself*

The final argument against separation is that ability is a discriminatory classification in its own right, quite similar to race or sex, and that selecting students and labeling them according to their ability is therefore impermissible. There is no jurisdiction I know of in which assigning students according to their academic ability has been recognized as discriminatory. Instead, courts regard ability as a relevant and benign differentiation in the field of education. Indeed, proving that a child was rejected from school due to academic ability is one way to undermine a discrimination claim. On the other hand, disability is a recognized category in discrimination jurisprudence, and failure to supply reasonable accommodation, or to include an individual within the least

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<sup>21</sup> This by no means implies that schools cannot and should not be doing much, much more to include students with disabilities.

restrictive environment constitutes discrimination.<sup>22</sup>

Why would we think that ability is a discriminatory classification? Ability, we could argue, is similar to other discriminatory classifications: it is something about us that we have no control over, and that (together with other things) makes us who we are. Like other discriminatory classifications, referring to an individual's inferior ability, or denying them access to certain goods based on it, is humiliating and degrading.

It seems, on the other hand, that ability is also quite different from the other classifications mentioned: First, ability, as opposed to the other classifications, is arguably a relevant attribute to consider in many educational contexts such as testing, assigning tasks etc. Labeling all of these practices "discriminatory" seems, therefore, ill advised.

Ability is different also in the way it is part of who we are. People see race, and gender as part of their identity. People's attitude toward their cognitive ability is more complicated – those with high ability tend to endorse their ability as a constitutive part of their identity. Low ability, however, is rarely similarly endorsed. Even when people realize they have lower ability they often see it as something superficial that does not express who they *really* are. They may blame neglect or inadequate education, and feel that their low ability is something that can and should be changed.

Another interesting difference between ability and other discriminatory classifications concerns the value of ability. When someone assigns inferior value to a certain race, gender or sexual orientation, she is mistaken: it isn't better, in any objective sense, to be white than it is to be black, nor is it better to be straight than gay.<sup>23</sup> The fact that racial or sexual categories are used pejoratively is simply a result of mistaken prejudices. Is ability the same? Our practices indicate that we do *not* view ability in the same way. A great deal of parents' and teachers' behavior toward children is directed toward developing their ability, and the motivations are not merely

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<sup>22</sup> The duty is to supply inclusive education "to the maximum extent appropriate." 20 U.S.C. § 1412(5)(B). Section 1412(5)(B) explicitly states that inclusion is not appropriate "when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(5)(B).

<sup>23</sup> Although it definitely could be the case that in certain societies belonging to one of these categories can have negative consequences. Similarly we could say that having higher ability is better for an individual because he is more likely to be wealthy and respected. The difference, however, lies in the question whether apart from the consequences of discrimination, prejudice, and any consequential considerations, there is higher value in belonging to one classification rather than the other.

instrumental – that high ability has good results for an individual – but also it seems that achieving high ability is seen as valuable in itself. If so, then ability is not like other discriminatory classifications: having high ability *is* better than having low ability.

Proponents of the social model of disability may argue that the view I present is prejudiced and ablist. They might insist that if the negative consequences of possessing low ability were eliminated, there would be no reason to prefer high ability over low ability.<sup>24</sup> Different levels of ability, they would argue, are simply a part of human diversity that should be celebrated and not fixed. Consequently, it is just as mistaken to say that high ability is better than low ability as it is to say that being white is better than being black. I am not persuaded. Although I firmly endorse the assertion that people should not be disadvantaged on account of their disability, and that all individuals have equal moral worth, I am not so quick to renounce the value of high ability, and I think that many, even within the disability movement, share this perfectionist intuition.<sup>25</sup>

The value attributed to high ability, if you are persuaded by it, together with the fact that ability is part of what constitutes our identity, makes labeling people as having low ability especially degrading, even when such differentiation is educationally beneficial. Classification according to race causes dignitary harm because it *wrongfully* assigns value to different races. In the case of ability we might think that the dignitary harm is even more severe given the fact that high ability is indeed better, in a certain sense, than low ability. Does this dignitary harm entail giving up on differential treatment altogether? It seems highly unlikely that this is the case. Inclusive education, one that doesn't separate students according to their ability can only succeed if students with low abilities are allocated extra resources, extra help to make sure they keep up. And therefore some kind of differential treatment is unavoidable. What we need here, therefore, is an argument that can distinguish between separation, which is, arguably, morally impermissible, and different treatment that doesn't entail separation, that is, arguably, morally mandatory. One possible justification for this seeming inconsistency may be that the practice of separation sends out an especially strong message of fixed and static inferiority, whereas help

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<sup>24</sup> LEN BARTON, *INCLUSIVE EDUCATION AND TEACHER EDUCATION: A BASIS OF HOPE OR A DISCOURSE OF DELUSION* (2003); JENNY CORBETT, *BAD MOUTHING: THE LANGUAGE OF SPECIAL NEEDS* (1996); TONY BOOTH AND MEL AINSCOW, *THE INDEX FOR INCLUSION* (2002)

<sup>25</sup> For a similar argument see: Jonathan Wolf, *Addressing Disadvantage and the Human Good* 19 *J. APPLIED PHILOSOPHY* 207 (2002). Wolf states that the social model requires adjusting the world rather than fixing the person. But there are, Wolf argues, deficiencies that need to be overcome; deficiencies for which solutions that involve "purely social change seem absurd" (p. 212).

within an integrated classroom does not. Such intervention seems to convey the message that lower ability is temporary and can be easily reversed, and that the differential treatment is a “normal” part of learning that all students may experience at one time or another.

This part described three educational practices that react to unequal abilities, and the normative debates surrounding them. However, the meaning of ability incorporated in these discussions is rarely discussed explicitly. A critical examination of the meaning of ability is required in order to gain a better understanding of educational justice and to be able to evaluate specific educational practices.

### 3. THE DIFFERENT MEANINGS OF ABILITY IN THEORIES OF DISTRIBUTIVE JUSTICE IN EDUCATION

This part aims to dispel the confusion concerning the meaning of “ability” in the literature concerning educational justice. I outline three meanings of ability that are used in the different discussions (some of which has already been touched upon above, and some will be introduced now), critically examine them and explore the moral upshots.

#### *3.a Ability as current knowledge and cognitive skills*

The first meaning of ‘ability’ used in the literature signifies current knowledge and cognitive skills. Ability in this sense is the competence to perform a certain action or task, of the kind that is expressed in “can” statements: Sarah can solve an equation; Sophie can write an essay in French.<sup>26</sup> Additionally, it is the propositional knowledge that students possess at the relevant point in time.<sup>27</sup>

Ability in this sense is the primary component of educational outcomes discussed in theories of educational justice, alongside other outcomes such as credentials, social skills, self-confidence, and cultural capital. For example, meritocratic theories of educational justice posit that it is unfair for an individual’s educational prospects to differ because of her background conditions

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<sup>26</sup> This is the notion of ability most often discussed in the philosophy of action, and is much more complicated than I describe here. Does ability obtain if there are external conditions that prevent it (is an agent *able* to swim if there is no swimming pool or ocean nearby); is success in a task sufficient to establish ability (the case of beginners luck), and does ability entail succeeding in the task every time it is attempted; For a general overview of these discussions see “Ability” STANFORD ENCYCLOPEDIA OF PHILOSOPHY.

<sup>27</sup> Note that the meaning of current ability covers both “knowing how” and “knowing that”, the two kinds of knowledge that have been discerned in epistemology literature. Both are included in this account because I recognize this to be the meaning of “ability” as it actually used in the context of a child’s current ability. For the classical depiction of the distinction between “knowing that” and “knowing how” see: Gilbert Ryle, *Knowing How and Knowing That*, 46 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 1 (1945).

(such as being born to poor parents or belonging to a racial minority).<sup>28</sup> By “educational prospects”, meritocrats mean educational outcomes, and especially the kind of outcomes that affect further rewards in life such as access to higher education or lucrative jobs. While other things (credentials, social skills, etc.) are also, arguably, relevant educational outcomes, ability in the first sense, namely currently possessed knowledge and skills, is by far the most significant of these educational outcomes, and sometimes also a precondition for them.<sup>29</sup>

Adequacy theories, such as those suggested by Elizabeth Anderson and Debra Satz, require that all children meet a threshold of adequate education so that they can participate as equals in society.<sup>30</sup> In order to function as an equal citizen, certain competences are required, certain knowledge is necessary, and the object of educational justice is ensuring all children receive them.

Ability in the sense of actual knowledge and cognitive skills can be characterized, therefore, as the (albeit incomplete) currency of justice in the educational domain – it is what egalitarians think should be equalized, what sufficientarians argue there should be an adequate amount of, and what prioritarians aim to maximize for the worst off. Educational resources are instrumental in achieving these goals, but what really matters is gaining actual abilities.

Ability, thus understood, is also what identifies the worst off in the educational domain – she is the one with the lowest current ability. Although there are different ways of defining who is worst off in general theories of justice, a ‘good-specific’ account of the worst-off for the educational domain points towards the child with the lowest current ability. All the other circumstances that may make an individual worse off, such as being poor, ill, or just generally miserable, are only relevant, in education, if they are also manifested (as they often are) in educational ability.

Is ability in the first sense a fair criterion for ascribing children to educational tracks, gifted programs or to special education classes?<sup>31</sup> On the one hand, it seems that current knowledge and

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<sup>28</sup> See Swift, *supra* note 2; Brighthouse, *supra* note 2.

<sup>29</sup> Test scores or diplomas, therefore, are merely the institutional expression of abilities, at least in a well functioning education system. Although it would be right to argue that if a student acquires all the relevant abilities but does not receive a diploma she does not have an equal educational outcome as her friend who has both. I assume, for simplicity, that test scores and diplomas perfectly reflect ability in the sense of actual competences and knowledge.

<sup>30</sup> See *supra* note 1.

<sup>31</sup> This section assumes that ability grouping is justified in a certain case, or cannot be justified but exists anyway. I do not argue that this is indeed the case in general or in any particular case. Whether or not a practice is justified depends, as was previously argued, on facts and on the theory of justice we adhere to.

ability must play a part in assignment decisions. It is wasteful to assign children to courses that rely on prior knowledge if they do not possess that knowledge; it is equally wasteful to assign students to courses that teach what they already know. Learning is based on development, and there is a logical order in which certain topics must be taught. Following this logic, principles of justice may view ability in the first sense as the fair way to allocate places in ability based groups and courses. This would be in line with a meritocratic account of just assignment policies to higher education or employment.<sup>32</sup>

I argue that ability in the first sense is not a fair criterion for assignment decisions. Since knowledge and cognitive skills one currently possesses is a result of a mix of other factors, the way current ability is formed can be relevant in terms of justice and influence the fair allocation. Current ability (ca) involves an integration of several factors, including at least these three: prior ability (pa), background circumstances (including resources, emotional support, etc) (b), and effort (e).<sup>33</sup> To see how these factors may be consequential in terms of justice, think of these three children – all candidates for an advanced course at school.

	Current Ability	Prior Ability	Effort	Background
Child A	8	5	1	2
Child B	6	2	3	1
Child C	9	1	2	6

If indeed, meritocracy supports current ability as the relevant criterion for assignment decisions, child C should be chosen, for she has the highest current ability (9). However, the main goal of a meritocratic principle of justice is to neutralize the effect of background circumstances in children's educational outcomes. Assignment decisions based on current levels of ability are unfair because they replicate patterns of injustice. Since her background is responsible for C's higher abilities, rather than ability and effort, a meritocrat should opt for Child A instead, because the sum of her prior ability and effort is highest (6, compared to 5 for child B and 3 for child C). Prioritarians would choose the worst off child in terms of current ability, meaning B

<sup>32</sup> Elizabeth Anderson, *Rethinking Equality of Opportunity: Comment on Adam Swift's How Not to be a Hypocrite*, 2 Theory and Research in Education 99, 102 (2004).

<sup>33</sup> Notice also that prior ability is also created by integrating former ability, effort and resources Effort can probably also be divided, giving separate weight to things that affect one's ability to put in effort: congenital inclination toward effort, resources allocated in motivating and supporting educational effort; etc.

(6). Luck egalitarian theories would also prefer B because she put in the most effort (3, compared to 1 for child B and 2 for child C).<sup>34</sup>

This example shows that *none* of theories of justice would advocate relying on current ability to determine educational assignment. Therefore the popular understanding according to which assignment according to current ability is fair should be rejected.

Still, current ability must, I argue, play a role in assignment decisions or we run the risk of assigning students to classes they cannot benefit from. We should, I think, treat current ability as a threshold condition that will exclude anyone that cannot gain from the resource (whether cognitive or social benefits). All students that stand to benefit from participating are all legitimate candidates for assignment.<sup>35</sup> The allocation should then be determined according to the different requirements of the principles of justice.

To sum up, ability as current knowledge and skills can be characterized as the main currency of educational justice; the way we recognize disadvantage (and who is disadvantaged) in the educational domain, and finally can serve as a threshold for ensuring that just allocations of resources are not wasteful.

### *3.b Ability as an inherent congenital trait*

The second sense in which ability is used in the literature concerning educational justice (and distributive justice more generally) concerns the individual's natural endowments and innate talents. According to this understanding, ability is congenital; we are born with a certain set of abilities determined by our genes. Our abilities are a constitutive factor of our identities, a part of ourselves. And while abilities no doubt develop with age and nurture, ability is a fixed core characteristic of the individual and any consequent educational achievements and experiences are largely an expression of it. Neglect that leads to current failures is also unable to alter this

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<sup>34</sup> Notice however, that in order to be able to invest effort, school must be challenging for a child. If one can glide through school without ever having to try hard, make an effort, invest time, it is unfair to later disadvantage her because she put in less effort than any other individual. Her lack of effort occurred through no fault of hers. Therefore a prerequisite for allowing inequalities that flow from differential effort is that children also have equal opportunities for making educational effort. Roemer's luck egalitarian account can offer a solution to this problem because effort is not measured independently, but rather in comparison to similarly situated individuals. JOHN E. ROEMER, *EQUALITY OF OPPORTUNITY* (1998).

<sup>35</sup> Although there are further possible complications: we may be required to factor in the different extent to which students may benefit from a certain resource. I cannot develop these issues further here.

core trait. It merely signifies that the ability, that is still “in there”, is not being used or materialized.

An individual cannot be held responsible for her natural endowments; neither can society. They result from the natural lottery that better endows some compared to others. Nonetheless, society may have a moral duty to react to people’s different abilities, depending on the specifics of the theory of justice. Luck egalitarians, for example, argue that it is unfair that people suffer disadvantage because of their inferior (academic) abilities.<sup>36</sup> Meritocrats, on the other hand, posit that ability and effort should be the determinants of one’s educational prospects, and therefore they accept unequal educational outcomes when these are caused by different abilities.<sup>37</sup> Prioritarians argue that improving the wellbeing of these individuals should be given moral priority.<sup>38</sup>

While luck egalitarian, prioritarian and meritocratic approaches differ in their reaction to differential ability, they use the term ‘ability’ in the same way, namely as an innate core trait, that is largely stable throughout one’s development and life.

This meaning of ability, though extremely common in the debates concerning distributive justice, cannot be defended. It has been unanimously rejected, for decades now, by developmental psychologists and neuroscientists. Most obviously, cognitive abilities are a product of both nature and nurture rather than merely a genetic trait or a physical condition.<sup>39</sup> Genes and surrounding factors such as nutrition, cognitive stimuli, and emotional conditions constantly interact and affect human ability, beginning from the very start of gestation and continuing throughout one’s life. Nurturing children enhances children’s abilities and creates new ones, whereas abuse and neglect diminish abilities, so they may deteriorate and exist no longer.

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<sup>36</sup> Jon Roemer, *ibid*; Brighthouse *supra* note 2; SHLOMI SEGALL, EQUALITY AND OPPORTUNITY (2013); John Calvert, *Educational Equality: Luck Egalitarian, Pluralist and Complex* 48 JOURNAL OF PHILOSOPHY OF EDUCATION 69 (2014).

<sup>37</sup> In fact, the meritocratic gives no reason to invest resources in children with low ability at all. As long as children with the same level of ability from all social groups achieve the same, meritocracy is untroubled if children achieve extremely little, and much less than they could. I have noted elsewhere that this is a weakness in the meritocratic approach (also addressing possible answers available for meritocracy against this charge). Reference omitted for review.

<sup>38</sup> Gina Schouten, *Fair Educational Opportunity and the Distribution of Natural Ability: Toward a Prioritarian Principle of Educational Justice*, 46 JOURNAL OF PHILOSOPHY OF EDUCATION 472 (2012).

<sup>39</sup> Robert Plomin and Stephen A. Petrill, *Genetics and Intelligence: What’s New?* 24 INTELLIGENCE 53 (1997); Carol L. Patrick, *Genetic and Environmental Influences on the Development of Cognitive Abilities: Evidence From the Field of Developmental Behavior Genetics*, 38 JOURNAL OF SCHOOL PSYCHOLOGY 79 (2000).

The genetic/physical version of ability is so obviously wrong that meritocrats (and philosophers holding other approaches) would probably quickly concede that both nature and nurture are responsible for ability,<sup>40</sup> and that when inequality in ability is created by nurture, it should be neutralized. Still, genes and other physical traits do account for part of one's ability (say 50% of it, for the sake of discussion), and therefore half of the inequality can still be safely attributed to "ability", with the normative implications that follow.<sup>41</sup>

However, the objection cannot be overcome so easily. Nature and nurture both influence not only ability, but also constantly affect each other.<sup>42</sup> Environmental factors such as stress or nurture have a profound effect on the physical dimensions of cognitive ability. They influence the development of the brain, and may even prompt genetic alteration.<sup>43</sup> Therefore the natural component of ability is itself shaped by the environmental causes. The "natural" characteristics in turn influence the way the surroundings treat the individual, in all further interactions. Nature and nurture are so fully interwoven in constituting human ability, that it makes no sense to try to discern the relative role that each factor played in creating 'ability'.

Further, human ability, as it is physically expressed, is not static and fixed. It is not a core physical characteristic that is inherent to the individual that persists throughout our lives; rather it

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<sup>40</sup> Noting this point: Stephan Gosepath, *What Does Equality in Education Mean?*, in: KIRSTEN MEYER (ED.), EDUCATION, JUSTICE, AND THE HUMAN GOOD: FAIRNESS AND EQUALITY IN THE EDUCATION SYSTEM 100 (2014); Calvert, *supra* note 36, at p.74 ; Harry Brighouse and Adam Swift, *The Place of Educational Equality in Educational Justice*, in: Kirsten Meyer (ed.), EDUCATION, JUSTICE, AND THE HUMAN GOOD: FAIRNESS AND EQUALITY IN THE EDUCATION SYSTEM, 14 (2014) ; Brighouse and Swift note that "bedtime stories themselves influence children's endowments and motivations". See: Harry Brighouse and Adam Swift, *Legitimate Parent Partiality* 37 PHILOSOPHY AND PUBLIC AFFAIRS 43, footnote 29 (2009).

<sup>41</sup> Gideon Elford, *Social Class, Merit and Equality of Opportunity in Education*, 22 RES PUBLICA 267 (2016) Schouten, *supra* note 38. Schouten suggests the prioritarian principle as a principle meant "to regulate inequalities due to differences in natural abilities" (p.474), that supplements the meritocratic principle that "requires us to eliminate disadvantages due to social contingencies" (p.473). Although she recognizes that ability is caused by both social and natural elements she assumes that "there is some discernable fact about the extent to which a child's achievement is affected by social class, and the extent to which it is affected by natural ability" (end note 5).

<sup>42</sup> Bruce D. Perry, *Childhood Experience and Expression of Genetic Potential: What Childhood Neglect Tells Us About Nature and Nurture* 3 BRAIN AND MIND 79 (2002); For a similar discussion in the field of Psychiatry, see: Manfred Bleuler, *Conception of Schizophrenia Within the Last Fifty Years and Today*, 56 SECTION OF PSYCHIATRY 945 (1963).

<sup>43</sup> Eyal Asor, Dorit Ben Shachar, *Gene environment interaction in periphery and brain converge to modulate behavioral outcomes: Insights from the SPI transient early in life interference rat model*, 6 WORLD JOURNAL OF PSYCHIATRY 294 (2016).

is flexible and constantly changing.<sup>44</sup> The concept of a “core” innate ability, therefore, does not exist.<sup>45</sup>

Undermining the meaning of ability as an innate trait creates a serious challenge for the principle of meritocracy and for educational practices that rely on it. If there is no such thing as a fixed core ability, then we have lost the basis for comparison needed to evaluate the fairness of educational outcomes. We cannot check whether the educational outcome reflects one’s innate ability if there is no such thing.

The problem for meritocracy cannot be solved, I think, by setting the point of measure at birth (or conception), and measuring further ability in comparison to that moment in time. Besides having significant practical problems (how do we measure a fetus’s ability?), this move simply does not help. The problem isn’t determining ability at any given point, but rather that there is no reason to assume that one’s ability at any specific moment in time represents the individual’s “core ability” any more than her ability at any other time.

Another solution for meritocracy and luck egalitarianism is to reject the second meaning of ability and to adopt an alternative one. The first option – ability as current knowledge and skills – is clearly unhelpful: as was detailed before, current knowledge and skills comprise the educational outcome that has to be evaluated by theories of educational justice. Ability in the first sense cannot be both the outcome we wish to examine and the means by which we evaluate it. Another, more promising possibility is to understand ability as potential. I move on to discuss this now.

### *3.c Ability as potential*

The third meaning of ability consists in ability as potential. Potential denotes an ability that is currently manifestly *absent*, but given certain conditions may come about.<sup>46</sup> This meaning differs from the previous two that refer to something complete that an individual already has. What it

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<sup>44</sup> ISRAEL SCHEFFLER, *OF HUMAN POTENTIAL: AN ESSAY IN THE PHILOSOPHY OF EDUCATION* (1985).

<sup>45</sup> Critics of gifted education have argued along these lines that the notion of giftedness is dubious because it relies on the un-based assumptions that giftedness is a fixed and identifiable trait, that it can be identified at a certain age, and that the similarities between all gifted children are significant enough to justify treating them similarly. See Barry Grant, *Gifted education Justifying Gifted Education: A Critique of Needs Claims and a Proposal*, 25 *JOURNAL FOR THE EDUCATION OF THE GIFTED* 359 (2002); Merry, *supra* note 8

<sup>46</sup> See Scheffler, *supra* note 44. Scheffler offers three possible meanings of potential: potential as capacity to become; potential as propensity to become; and potential as capability to become (pp.46-67). The distinction, as I understand it, lies in the proximity of the chances to realize potential. For a moral implication of these differences, see: Reference omitted for review.

means to have ‘potential’, therefore, is that given certain resources or actions, one will acquire an ability or knowledge. In other words, it entails an existing propensity to translate resources into abilities. Different individuals differ in their potential, therefore, both with regard to how high their ability may become given certain conditions, but also in how effective they are in translating resources into abilities.<sup>47</sup>

Alongside the conditioned possibility of obtaining ability, potential also signals the *confines* of one’s ability. Given the right investment and treatment an individual will be able to obtain certain abilities, but there are abilities that are beyond her reach. The limited potential of an individual affects also the boundaries of the duties of justice that we owe her. This aspect of potential, namely, as a restriction on duties toward individuals can be potentially very helpful for theories of educational justice, as I will detail below.

First, however, how would incorporating potential as the meaning of ability affect meritocracy? It would entail equalizing educational outcomes (abilities in the first sense) except when inequality results from differential effort and differential potential. In other words, only inequalities caused by the limitations of potential would be justified (as well as inequalities due to effort). Any inequality that is not completely inevitable in terms of the constraints of potential would not be justified. This interpretation of meritocracy is much more demanding than the one traditionally described in the literature. However, as opposed to the traditional account, this relies on an interpretation of ability that can be sustained.<sup>48</sup>

Is ability as potential subject to the same criticisms that were fatal to ability as an innate trait? One might object that potential, like ability, is influenced by nature and environment, and because it is impossible to distinguish between the two, ability as potential, exactly like ability as natural endowments, is not a workable interpretation of ability. However, potential in the new suggested meritocratic account serves as a constraint. There is, arguably, no requirement of justice to equalize beyond what is possible in terms of potential and so the causes of the differences in potential – social or natural – are irrelevant.

It could also be argued that because ability is flexible rather than fixed, potential is also, most probably, flexible, rendering ability as potential meaningless in much the same way. The

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<sup>47</sup> I thank Daniel Attas for this point.

<sup>48</sup> Interestingly, Debra Satz mentions a principle of justice based on potential but dismisses it without much explanation: “the equal development of children’s potentials among different social groups is not plausible as a guiding principle for educational policy”, *see* Satz, *supra* note 1, p. 631.

flexibility of potential, however, doesn't mean that there are no boundaries to people's abilities. It may be possible, with faith and hard work, to push people's limitations significantly, but after a certain point, only negligible progress can be made. There are individuals who will never, no matter how much effort and resources will be invested, achieve mastery of quantum physics. There are individuals for whom learning to read and write is equally beyond reach. The fact that some limitations (even slight ones) exist suffices to defend ability as potential from the criticism that applies to the previous one. There may be problems diagnosing potential, it may be much more flexible and subject to influence than many assume, but it cannot be denied categorically. Note that the flexibility of potential may be different in extent and nature than the flexibility of one's current ability. It may be less (or more) flexible, and it may be easier to affect at certain stages in life (early childhood, say) than others. These empirical questions could greatly affect policy decisions, suggesting, for example, that resources should be directed toward educational interventions for children from impoverished backgrounds in early childhood.<sup>49</sup>

A different problem is that asserting that potential is limited may be corrosive to educational justice because allowing teachers to assume these limitations curtails students' development. Teachers' expectations of their students are known to have a significant effect on students' actual performance, and therefore by accepting limited potential of students teachers are in fact creating and reinforcing those limitations.<sup>50</sup> This is especially problematic because potential and ability are so hard to measure and prone to mistakes and biases. I am sympathetic to these concerns, and concede that these problems might justify rejecting pedagogical practices that rely on such predictions, such as ability grouping. But even if we have good reason to act in our educational practices *as if* there is no limit to potential, this does not undermine the existence of these limitations, and the possibility that these limitations may have moral implications. So we need to distinguish between what we adopt as good pedagogy and what we think is good normative theory.

Potential, therefore, implies the limitations of one's ability. This restrictive aspect of ability has further important expressions in theories of educational justice. All theories of justice in

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<sup>49</sup> See for example: *Hoke County Bd. of Educ. v. State*, 95 C.V.S. 1158, 2000 WL 1639686, slip op. at 30 (N.C. Sup. Ct. Oct. 12, 2000) (holding that at-risk students are constitutionally entitled to a preschool education); James E. Ryan, *A Constitutional Right to Preschool?*, 94 CAL. L. REV. 49 (2006) (arguing for a constitutional right to preschool based on state constitutions' education clauses as supported by education finance adequacy litigation)

<sup>50</sup> Susan Hart, *A Sorry Tail: Ability, Pedagogy and Educational Reform*, 46 BRITISH JOURNAL OF EDUCATIONAL STUDIES 153 (1998).

education must contend with the challenge according to which some students, despite efforts and resources, are unable to achieve at a certain level. Ability as potential may help justify results that fall from initial requirements of justice, serving as a constraint on requirements of justice. For instance, adequacy theories must contend with cases in which certain children's current knowledge and abilities cannot be promoted to the adequacy threshold. Since it would be useless to continue investing resources in children when doing so is wholly ineffective, adequacy proponents must concede that some individuals are excluded from the adequacy threshold and detail the duties society owes to such individuals who, as a result, cannot participate as equals in society. The concept of potential can be useful in thinking about this, suggesting that when an individual's potential falls below the adequacy threshold, this duty does not apply (although other duties may).

Prioritarian approaches are also challenged by individuals with persistently low current abilities that require endless resources for negligent progress, and potential could therefore be instrumental in delineating the limits of the duties towards the worst-off.<sup>51</sup>

There remains one last issue concerning ability as potential that has already been touched upon briefly, namely the perfectionist argument concerning the value of ability.

The concept of potential is often used as a justification for educational practices that are meant to promote those with higher (current) abilities, or those that the system believes can achieve higher skills (such as gifted education or tracks for high achievers). As such, these arguments often aim to constrain requirements of justice that may oppose allowing high achievers to gain further advantage. If we accept the perfectionist intuition, according to which high ability has independent value (the details of which would still need to be filled in<sup>52</sup>), the fact that children have potential can become a reason to deviate from requirements of justice (that require, typically, investing in the worst-off), and to invest in the education of those already better off.

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<sup>51</sup> Egalitarian theories face the same challenge because individuals with consistently low achievements require either endless resources or leveling down. There are several possible responses to this challenge, all involving pluralism of some sort. One option is recognizing that other principles of justice such as adequacy should also be taken into consideration thus ensuring that efforts in favor of the worst off will not result in inadequate education for children with high abilities. Brighthouse and Swift, *supra* note 40. Another option is balancing the requirements of justice (such as leveling down, or investing in the worst-off) with other values and interests. See *supra* note 46.

<sup>52</sup> For example, is realizing human potential only valuable at the very highest level of human excellence or is any realization of potential equally valuable; what are the relations between our assertion that realizing potential is good and the duty to realize it; and other questions. See Richard J. Arneson, *Perfectionism and Politics*, 111 ETHICS 37 (2000).

Take, for example, the debate concerning the legitimacy of educational programs for gifted children. The additional resources spent in children with especially high abilities in programs for the gifted are a central source of criticism of them. All theories of distributive justice in education focus on the needs of disadvantaged children, meaning children whose education, ability and achievements are worst. Gifted children are, typically, on the exact opposite end of the spectrum: they are the most able; those with the highest achievements. It is therefore, hard to justify allocating extra resources from a limited budget to children who are already so advantaged, when doing so is bound to decrease the educational resources available to disadvantaged students. An additional worry is that concentrating gifted children in separate classrooms (when the programs include separate classrooms) may cause negative peer effects in the regular classrooms.<sup>53</sup>

As a result of these objections, a special justification for gifted education programs is required. The literature offers several possible justifications, such as claiming that gifted children have “special needs” that justify creating separate programs for them and allocating additional resources to that end;<sup>54</sup> and that gifted children need special programs in order to flourish.<sup>55</sup> These arguments, however, have been sharply critiqued, and rightly so.<sup>56</sup> The needs that experts mention – such as acquiring information, gaining an understanding of their unique abilities, being challenged – are completely universal, and all children need them in order to flourish. Furthermore, many of the programs designed for gifted children could easily benefit all students, and therefore the choice to supply them exclusively to gifted children cannot be justified.<sup>57</sup> Additionally, as Kirsten Meyer points out, if human flourishing is the final aim of education, “we

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<sup>53</sup> Although this may be negligible in gifted programs (as opposed to ability grouping or selective schools) because gifted children are, by definition, a very small percentage of the student population, so gifted programs involve removing, on average, less than one student from each class. Additionally, some (although definitely not all) gifted children may be disruptive in a regular classroom so removing them may not have a negative effect.

<sup>54</sup> The discourse relies on the equivocating gifted children with children with disabilities, for whom the fairness of additional resources is firmly established.

<sup>55</sup> See Merry, *supra* note 8. Note that Merry argues that in a well functioning education system, only few gifted students will not be able to be given these within a regular classroom.

<sup>56</sup> Kirstin Meyer, *Educational Justice and Talent Advancement*, in: KIRSTEN MEYER (ED.), *EDUCATION, JUSTICE, AND THE HUMAN GOOD: FAIRNESS AND EQUALITY IN THE EDUCATION SYSTEM* ch. 8 (2014); DONNA Y. FORD, *DESEGREGATING GIFTED EDUCATION: SEEKING EQUITY FOR CULTURALLY DIVERSE STUDENTS* 143 (2003); Richard Bailey, *Talent development and the Luck Problem*, 1 *SPORT, ETHICS AND PHILOSOPHY* 367 (2007).

<sup>57</sup> Mara Sapon-Shevin, *Equity Excellence and School Reform: Why is Finding Common Ground so Hard?* In: *RETHINKING GIFTED EDUCATION* (Borland ed., 2003), chapter 8 127-142. Sapon Shevin gives an example of a theatre enrichment program for gifted children that could easily suit the regular curriculum, if sufficient resources were available.

do not owe the talented anything, because they are already more flourishing than most humans”.<sup>58</sup>

A different argument must therefore be put forward in order to justify gifted education. Two promising possibilities include the social advantages of gifted education and the value of developing potential. According to the first, gifted programs are justified because they contribute to financial growth, scientific research, and other social interests. However, it would have to be demonstrated that investing in gifted programs is, in fact, more beneficial for society than investing the same resources in promoting those with low abilities. Additionally, this is a relatively narrow justification for gifted education because it does not grant any specific gifted child an entitlement to receive the service. The scope of gifted programs, the courses they teach, and the choice of participants should be directed solely toward creating the intended social benefits.<sup>59</sup>

The second possible argument is related to ability as potential. High ability, it could be argued, is valuable, much like excellent art or fine music. According to this perfectionist argument, creating high ability, in its highest and most perfect form, is good, in itself (regardless of its worth to any individual), and therefore failing to develop the potential of the talented into these high abilities is “a shame” or “a waste”.<sup>60</sup>

The intuition that realizing potential is good, independently from how it affects people, is extremely widespread and salient in educational practice. Think of a bright young adult happily giving up on developing her cognitive potential (for example, despite showing remarkable scientific promise she decides not to pursue her schooling beyond high school). Assume that by doing so she suffers no decline in wellbeing. We still feel a twinge of regret; we think it’s a shame that such great potential will be wasted. This regret cannot be explained (at least not all of it), I think, by the lost advantages that society could have gained had she decided to pursue her studies, nor the lingering doubt that she would have been better off had she chosen otherwise. We regret the loss of cognitive human excellence because we feel it is valuable in its own right.

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<sup>58</sup> Meyer, *supra* note 56.

<sup>59</sup> Although gifted children are entitled to be treated fairly in the procedure.

<sup>60</sup> For a general definition of perfectionist views, see e.g. Arneson, *supra* note 52. Brighthouse & Swift argue that “the development of human talent is of intrinsic good” (p.120) however it is unclear whether they also agree that high ability has value independent of the value it has for an individual. Harry Brighthouse and Adam Swift, *Educational Equality versus Educational Adequacy: A Critique of Anderson and Satz* 26 JOURNAL OF APPLIED PHILOSOPHY 117 (2009).

Think of another example: two children demonstrate the same level of knowledge and cognitive competences (ability in the first sense). This level of ability, for one student, is the best she can do, whereas for the other, this is a stroll in the park; she has only just begun developing her potential. Outcome based theories are inclined to argue that the current outcome is just. There is no justification to invest further in the student whose potential is higher (even if there are further available resources that the disadvantaged child would not benefit from) as it would cause an unjust gap in their educational outcome. This, however, is at odds with our intuitions. We feel that there *is* a morally relevant difference between the two students, namely that one has further potential and the other does not, and we might also think that this difference justifies differential treatment.

People often feel this sense of waste more strongly when it pertains to their own children, or to children who are otherwise close to them. Besides the various instrumental reasons parents have for wanting their children to develop the highest current ability possible, parents are also often those who see their children's potential most favorably. Therefore even if the perfectionist argument for high ability doesn't attach value to the high ability of any specific child, parents (or other people with close relationships to children) are the ones that can indicate that a specific child has potential that should be developed.<sup>61</sup> Additionally, if we concede that high ability is good, it seems to follow that individuals have reason to want it to be expressed in themselves (or their loved ones), and not merely to exist in the world. As a result, individuals (and people who care for them, primarily their parents) have an additional interest to develop their children's potential. This interest, however, is held equally by all individuals – all people want the perfectionist value to be expressed in them – and therefore allocating resources toward developing high ability should be subject to the relevant principles of justice. Developing high ability has independent value, therefore, and can constrain distributive requirements, but the decision of whose talents should be developed is subject to distributive considerations.

This perfectionist intuition has significant force. The aversion from preventing full development of human talent is so strong that it has been accommodated into certain principles of justice, and seems to be a *desideratum* of a theory of educational justice, making theories that do not allow full realization of high abilities seem less compelling. Meritocracy for example, accommodates

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<sup>61</sup> Although parents' partiality toward their children and their insufficient basis for comparison might make their input overly favorable.

the perfectionist intuition by allowing unequal outcomes that are the result of unequal potential. Adequacy also allows development of human potential as long as all children achieve an adequate education. The highly talented, in both theories of justice can realize their potential, and resources can be invested in realizing that goal.

However, the perfectionist claim, I think, is better understood as an external constraint on principles of justice rather than an integral part of theories of justice. The intuition concerns the objective, independent value of high ability, regardless of the value it may hold for an individual. This independent character of the perfectionist value differs from typical considerations of justice that focus on benefits and costs of allocations *for individuals*. Serving as an external constraint, the value of realizing potential and developing high ability should be factored in after the initial requirements of justice have been determined. However, further thought is required to determine the extent to which developing potential should constrain the concern for the disadvantaged.

#### 4. TOWARD A THEORY OF ABILITY

Despite the fact that justice in education is so saturated with discussions of ability, the concept is not explicitly defined and discussed. One oft-used meaning of it – as an innate trait – cannot be supported empirically; the others are under-theorized and often confused, leading to lack of analytical clarity and mistaken arguments. An elucidation of the concept of ability is therefore crucial to theorizing about educational justice.

Through examining the main uses of ability in educational justice, the paper aimed to lay the foundations for a discussion that will lead to a comprehensive theory of ability – one that would account for individuals with all levels of ability, for all educational practices reacting to unequal abilities, and one that would also fit in with the general principles of justice.

The exploration I undertook in the paper involved touching upon many different arguments, examples, and challenges, each of which, unfortunately, was not dealt with as thoroughly as it deserves. Still, several central themes emerge. I now highlight three such themes that may offer a basis for discussion toward a general analytical framework concerning ability in educational justice. I offer here only the most general sketch of these themes that I take to be the central axis around which a theory of ability should be built.

The first concerns what I take to be the two most useful meanings of ability in educational justice. Each of these has its own separate role within theories of educational justice. The first consists of current ability. This is a temporal sense of ability that reflects only a very specific point in time. Current ability is caused by multiple factors, including previous ability, effort and resources and is the sense of ability that constitutes the currency of justice in the educational domain, and that determines who is better off and who is worse off in the educational domain. The second meaning of ability is potential, and its main role within theories of educational justice is setting the limits, the constraints on what we seek as a matter of justice.

Ability, understood in both these senses, faces some serious problems of measurement. Since some of the worst injustices can be attributed to measurement problems, this concern should not be taken lightly. And while these are challenges should be solved primarily by education experts, the fact we are so bad at recognizing children's abilities (current and potential) seems to have moral consequences, perhaps excluding practices that involve irreversible labeling or segregation.

The third important issue that requires elaboration within a theory of ability concerns the perfectionist value of ability. If, as I suspect, having high ability is better than having low ability and the perfectionist intuition is not simply a result of ablist prejudice, classifying children with lower ability may cause significant dignitary harm to them. Such classifications, however, are unavoidable if we are to aid learners with lower current achievements develop and improve their abilities. As a result, we must think more about how to discern between different treatment that should be prevented – maybe ability grouping – and differential treatment that should be endorsed.

Conceding the perfectionist argument also entails that treating children with high ability favorably (such as creating gifted programs), may sometimes be morally justified and may override concern for the worst off. However further thought is required to determine when this is so, and when limiting their flourishing is still justified. Does the perfectionist value of ability entail developing only the most talented, or should we adopt a less elitist version of perfectionism.<sup>62</sup> The concern here is that the value of high ability may override the requirements of justice in almost any case, and therefore render our principles of justice meaningless.

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<sup>62</sup> Theoretically, there could be non-elitist approaches such as prioritarian approach according to which it is especially important to realize the potential of those whose potential is least developed (*See* Arneson, *supra* note

These short observations fall far short of putting forward a theory of ability. I hope, nonetheless, that they offer a useful starting point for a direct discussion of ability, a concept exceedingly fundamental to educational justice. And although different theories of educational justice react differently to ability (and to unequal abilities), the themes detailed in the conclusion apply across the board to all the different theories of educational justice. The shared roles that ability plays in all these theories and the shared challenges it raises indicate that thinking further about ability can contribute greatly to the theoretical exploration of educational justice.

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52). I think this is a problematic approach, however, because it does not go hand in hand with the main motivation for perfectionism, namely the value of perfecting human achievement. If the potential of the worst off is prioritized, the most excellent achievements might not be developed. The aim of achieving a just outcome despite perfectionism is better served, I argue, by constructing distributive justice and perfectionism as complementing and constraining each other. See also Christine Synowich, *New Approach to Equality*, in: *POLITICAL NEUTRALITY* 178 (eds. Daniel Weinstock & Roberto Merrill, 2014).